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Prosecutorial Control Over a Defendant's Choice of Counsel

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PROSECUTORIAL CONTROL OVER A DEFENDANT'S CHOICE OF COUNSEL

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I. INTRODUCTION

During the last decade, federal prosecutors have discovered a new weapon in their adversary arsenal — the ability to exercise control over a defendant's choice of counsel. This development can be understood, at least in part, as a response to a change in the criminal defense bar. Beginning in the early to mid-1970s, federal prosecutorial resources were allocated to white-collar crimes and later to drug-related offenses.[1] These changes in policy brought into the criminal justice system a significant population of defendants who had the economic resources to retain attorneys and compensate them generously. The compensation attracted lawyers to the practice of criminal defense and enabled attorneys representing such clients to finance comprehensive defense efforts.[2] In these areas, the traditional resource limitations that accompany the defense of criminal prosecutions were lifted, and defense counsel began to present vigorous challenges to the government.

For the first time, on a regular basis, prosecutors did not have a

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1. *See* K. MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 19 (1985) [hereinafter MANN]. In 1979 the Justice Department established the Economic Crime Enforcement (ECE) Program "to attack nationwide the problem of white-collar crime." U.S. DEPT. OF JUSTICE, AN IMPLEMENTATION STUDY OF THE DEPARTMENT OF JUSTICE ECONOMIC CRIME ENFORCEMENT PROGRAM (December 1980). The ECE Program concentrated manpower in selected offices of the U.S. Attorneys to enhance the Department's capability to combat white-collar crime. Each unit consists of three full-time Assistant Attorneys General of the Justice Department's Criminal Division. As reported to Congress, the top priorities of the division were white-collar crime, political corruption, organized crime and drug trafficking. *Oversight Hearing Before the Subcomm. on Crim. Justice of the House Committee of the Judiciary*, 96th Cong., 2d sess. 2 (1980) (statement of Philip B. Heymann, Dept. of Justice).

2. In 1977, Paul Connolly, the head of the American Bar Association's section on litigation, remarked that white-collar criminal defense was the fastest growing legal specialty. *See* MANN, *supra* note 1, at 21.

significant resource advantage over their opponents.[3] This change in defense resources prompted a predictable adversarial response — prosecutors reacted to the presence of such well-equipped adversaries. Prosecutors began to use a series of practices that enable them to exercise control over defendants' choice of counsel.[4] Such practices include motions to disqualify attorneys from representing clients, subpoenas issued to lawyers for client-related information, and attempts to forfeit fees paid to attorneys or to prevent defendants from using their assets to retain attorneys. The growing use of these practices poses a serious threat to both defendants' choice of counsel under the sixth amendment and to the adversary process.

As criticism of such prosecutorial practices has increased, common prosecutorial responses have emerged. One argument frequently made by prosecutors is that defendants will always have lawyers, therefore, disqualification of a specific lawyer or of paid lawyers as a group, does not present a serious threat to sixth amendment rights.[5] Prosecutors maintain that if a defendant receives a competent lawyer, the functions served by prosecutorial practices outweigh the defendant's particular choice of counsel.[6] Further, prosecutors discount the criticism as being primarily motivated by the economic self-interest of the private criminal defense bar.

This article addresses the question of whether these practices which provide prosecutorial control over defendants' choice of counsel is proper. In section II of the article, I review the prosecutorial

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3. As the government shifted its focus to white-collar and drug-related offenses, the pool of defendants became more heavily composed of people with the ability to spend large amounts of money on legal representation. This created a demand for defense experts, which was filled largely by highly skilled and well-trained attorneys who had the experience and resources to become effective adversaries to prosecutors. *See generally* MANN, *supra* note 1, at 20-22.

4. The emergence of the practices may also be understood as reflecting the particular investigative and prosecutorial needs associated with white collar and complex federal drug offenses. In contrast to offenses such as theft and robbery, many white-collar and complex drug-related offenses commonly involve a series of acts, some of them not necessarily criminal in isolation, numerous participants and financial transactions. Gathering evidence to prove such offenses may require techniques different than those used to investigate and prosecute other types of criminal offenses. Further, the practices might also be seen as a means to respond to what is perceived by some to be the increasing problem of attorney involvement in such offenses.

5. This argument by prosecutors is discussed in THE COMMITTEE ON CRIMINAL ADVOCACY OF THE N.Y. CITY BAR ASS'N, THE FORFEITURE OF ATTORNEY FEES IN CRIMINAL CASES: A CALL FOR IMMEDIATE REMEDIAL ACTION at 480, 492, 503 (1986) [hereinafter FORFEITURE].

6. As is discussed *infra*, the practices may serve a variety of purposes. For example, subpoenas served upon attorneys might provide the government with evidence that will be used to prove criminal wrongdoing, and forfeiture of attorneys' fees is said to insure that a defendant is not able to obtain benefit from the proceeds of illegal activity.

practices now in vogue, briefly explain how they provide the prosecution with control over defendant's choice of counsel and discuss the frequency with which they are used. Section III then examines the validity of the practices and explains why examining the objectives of such practices is an unsatisfactory measure by which to judge their legitimacy. Finally, in section IV, I propose a prescriptive definition of adversarial fairness based on the allocation of adversarial powers that can be used to evaluate the legitimacy of the prosecutorial practices.

II. The Practices and Prosecutorial Control

A. *Methods of Control*

Discussion in this article is limited to three prosecutorial practices: (1) efforts to disqualify an attorney from representing a particular defendant; (2) the issuance of grand jury subpoenas to attorneys for client-related information; and (3) attempts to forfeit assets transferred to an attorney as payment for legal services and related efforts to prevent a defendant from using his or her assets to retain counsel. Each of these practices share two important characteristics. First, the the prosecution has sole discretion in deciding whether to employ one of the practices. Second, the successful use of any of the practices may disqualify a specific attorney from representing a particular defendant.

1. *Disqualifying an Attorney*

The government may bring a motion to disqualify an attorney from representing a specific client in a criminal case when the government claims its interests will be adversely affected by such representation. These government motions are commonly based on the fact that the attorney has previously represented a witness who will testify for the government at trial.[7] In such cases, the government argues that the possibility of cross-examining the witness with information obtained through the prior attorney-client relationship grants the defense attorney a competitive advantage over the government. In addition, the government argues that the attorney's continued involvement intrudes upon the witness's attorney-client

7. *See, e.g.*, United States v. O'Malley, 786 F.2d 786 (7th Cir. 1986); United States v. James, 708 F.2d 40 (2d Cir. 1983); United States v. Provenzano, 620 F.2d 985 (3d Cir. 1980), *cert. denied*, 449 U.S. 899 (1981); *see generally* Margolin, *Pretrial Disqualification of Criminal Defense Counsel*, 20 Am. Crim. L. Rev. 228 (1982).

privilege.[8] In some cases, these disqualification motions are filed after an attorney has represented the defendant over a significant period of time. Where the motion is successful, the defendant is deprived of representation by the attorney of his or her choice, despite the pre-existing attorney-client relationship.

2. *Grand Jury Subpoenas*

Prosecutors may utilize grand jury subpoenas to obtain client-related information from attorneys.[9] Although such subpoenas are nominally issued by a grand jury, the decision to issue a subpoena is actually controlled by the prosecutor conducting the grand jury's investigation. Information commonly requested of attorneys includes evidence of payment of legal fees as well as business and financial transactions conducted by the attorney for the client.

Although courts have held that the attorney-client privilege does not generally bar the production of such information,[10] defense attorneys regularly challenge such subpoenas. These challenges — which have sought to impose judicial controls over the prosecutor's ability to obtain client-related information by subpoena — are based on claims that such action interferes with the sixth amendment right to counsel. The challenges, however, have generally been unsuccessful.[11] Prosecutors thus maintain relatively unbridled discretion to decide when to issue such grand jury subpoenas.

Subpoenas issued to attorneys for client-related information have an effect beyond providing information to the prosecution. Once an attorney is required to provide client-related information to the government, the lawyer must often cease representation.[12] The ethical prohibition precluding lawyers from being witnesses against their clients generally prevents a lawyer from continuing to represent the client in any criminal prosecution arising out of the investigation.[13]

3. *Forfeiture of Attorneys' Fees*

Federal prosecutors claim to have the authority to seek forfei-

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8. *See O'Malley*, 786 F.2d at 791.

9. *See* S. Rudolf & T. Moher, *The Attorney Subpoena: You Are Hereby Commanded to Betray Your Client*, 1 CRIM. JUST. 15 (1986).

10. *See In re* Grand Jury Subpoena Served Upon Doe, 781 F.2d 238 (2d Cir. 1986) (en banc); United States v. (Under Seal), 774 F.2d 624 (4th Cir. 1985).

11. *See, e.g., In re* Grand Jury Subpoena Served Upon Doe, 781 F.2d 238; United States v. (Under Seal), 774 F.2d 624.

12. *See* Gov't of the Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984).

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-9 & DR 5-102 (1980).

ture of attorneys' fees by virtue of the "relation back" principle added to 18 U.S.C. section 1963(c) and 21 U.S.C. section 853(c), under the Comprehensive Crime Control Act of 1984.[14] Prosecutors claim the decision to seek forfeiture of attorneys' fees is discretionary and not subject to judicial control or supervision.[15] While some courts have concluded that such forfeiture is constitutionally prohibited,[16] the Department of Justice insists such efforts are proper and has made known its intention to continue them.[17] Forfeiture attempts can also result in terminating a lawyer's representation of a client.

For several reasons, the prosecution's announcement of its intention to seek forfeiture of any assets used to pay an attorney's fee, may force an attorney to withdraw from continued representation of his or her client. One such reason is that the attorney may be placed in a conflict of interest position with the client.[18] Similarly, a forfeiture attempt may place the attorney in the position of handling a criminal case on a contingency fee basis, which is prohibited by the Code of Professional Responsibility.[19] A third consequence of forfeiting attorneys' fees is that the attorney may have to defend the case with the prospect of not being paid for expenses and fees.

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14. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified at 18 U.S.C. § 1963(e) and 21 U.S.C. § 853(c) (1984)). Under the "relation back" concept, the government's interest in property subject to forfeiture vests at the time of the commission of the act which makes the property subject to forfeiture, and a subsequent change in the ownership or form of property does not affect the government's interest. *See* United States v. Bassett, 632 F. Supp. 1308, 1310-14 (D. Md. 1986), *appeal docketed*, No. 86-5064 (4th Cir. May 19, 1986).

15. *See infra* text accompanying notes 21-33. The Department of Justice has issued internal guidelines to provide guidance in deciding in what cases forfeiture of attorneys' fees should be sought. *See* UNITED STATES ATTORNEY'S MANUAL, JUSTICE DEPARTMENT GUIDELINES ON FORFEITURE OF ATTORNEYS' FEES, 9-111.000-9-111.700 (1985) [hereinafter DOJ FORFEITURE GUIDELINES]. The Department, however, has insisted that these guidelines are not subject to judicial enforcement. *See also In re* Special 1983 Grand Jury (Klein), 776 F.2d 628 (7th Cir. 1985).

16. United States v. Bassett, *appeal docketed*, No. 86-5064 (4th Cir. May 19, 1986). United States v. Badalamenti, 614 F. Supp. 194 (S.D.N.Y. 1985); United States v. Rogers, 602 F. Supp. 1332 (D. Colo. 1985).

17. DOJ FORFEITURE GUIDELINES, *supra* note 15, at 9-111.210.

18. FORFEITURE, *supra* note 5, at 482. A conflict may exist because the forfeiture of the attorney's fee can play a role in the disposition of the case. The attorney may be inclined to pursue a disposition, through a plea agreement or result at trial, which will ensure that his or her fee is not forfeited even though a result more favorable to the client might be obtained if the money used to pay the attorney was forfeited to the government.

19. "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1980).

B. *Survey of Criminal Defense Lawyers*

The prosecution's use of disqualification motions, subpoenas, and forfeiture actions has reportedly increased. In May and June of 1985, I surveyed by mail, all of the members of the National Association of Criminal Defense Lawyers (NACDL). The survey consisted of questions concerning the use of each of the prosecutorial practices described above.[20] A total of 1,648 persons, representing a response rate of 42%, returned the survey questionnaire. Twenty-six percent of the respondents (430) indicated they had been the subject of government attempts to disqualify them from representing particular clients; 18% (294) responded that they had received grand jury subpoenas requesting client-related information; and 21% (348) reported that the government had questioned or actually sought forfeiture of the fees received by or to be paid to attorneys for representing criminal defendants.

Moreover, attorneys reported a dramatic increase in these practices over time. Eighty-eight percent of the attorneys who had been subject to government disqualification efforts reported that the attempted disqualifications had occurred since 1980; 86% of the attorneys who had received grand jury subpoenas indicated they had received the subpoenas since 1980; and 95% of those attorneys whose fees had been questioned reported that the fee challenges had occurred between 1980 and June 1985.

C. *Department of Justice Guidelines*

Since the above survey was conducted, the Department of Justice has adopted internal guidelines governing the issuance of grand jury subpoenas to attorneys and the forfeiture of attorneys' fees.[21] These guidelines may reduce both the number of grand jury subpoenas issued to attorneys and the government's efforts to institute formal forfeiture proceedings against attorneys' fees. Even if such decreases occur, however, the effect of the disqualification practices will remain significant.

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20. The survey also addressed other prosecutorial practices which affect the representation of criminal defendants. A report on the findings of the survey is presented in *Reports From the Field: Prosecutorial Practices Compromising Effective Criminal Defense*, THE CHAMPION 7 (May, 1986) and Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, 1 CRIM. JUST. 2 (1986).

21. UNITED STATES ATTORNEY'S MANUAL, POLICY WITH REGARD TO THE ISSUANCE OF SUBPOENAS TO ATTORNEYS FOR INFORMATION RELATING TO THE REPRESENTATION OF CLIENTS 9-2.161 (1985); DOJ FORFEITURE GUIDELINES, *supra* note 15, at 9-111.000-9-111.700.

First, the subpoena and attorneys' fees guidelines concede little to the defense bar. The subpoena guidelines do not provide for any review by a judicial officer or an independent official to determine whether the subpoena seeks information that cannot be obtained elsewhere. Moreover, the forfeiture guidelines authorize federal prosecutors to seek attorneys' fees in a broad range of circumstances, without any showing that the fees were part of a sham transfer of a defendant's assets.[22] Further, the Department has maintained that the guidelines are not enforceable by courts.[23]

Second, the threat of using the above practices may prove to be almost as effective as the actual use of the practices. If a prosecutor announces an intention to obtain a grand jury subpoena for a defense attorney's records, the attorney may be motivated to voluntarily provide the information in order to avoid the expense and potential notoriety of contesting the issuance of a subpoena. Similarly, a prosecutor's statement of intent to seek forfeiture of any fee paid to the defense attorney may cause defense counsel to decide not to represent a particular defendant.[24] Thus, the legitimacy of these practices must be examined.

III. THE LEGITIMACY OF THE PROSECUTORIAL PRACTICES

The defendant does not go without representation in cases in which the prosecution practice results in the defendant being denied the attorney of his or her choice. Although defendants might not obtain their first choice, they are able to choose other lawyers or, if necessary, the court appoints a lawyer.[25] Many defendants do not get their first choice of counsel for economic or other reasons. Prosecutors argue that as long as defendants are able to receive representation from competent attorneys, there is little harm in using one of the above practices to deny the defendant his or her attorney of choice. Conversely, defense attorneys claim these practices are not legitimate tactics and that prosecutors should not be allowed to utilize them in the adversary contest.

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22. A complete analysis of the deficiencies in both sets of guidelines is found in FORFEITURE, *supra* note 5.

23. *In re* Special September 1983 Grand Jury (Klein), 776 F.2d 628 (7th Cir. 1985).

24. Fourteen percent (230) of those attorneys responding to the survey indicated that they had decided not to take a case because the government might attempt to forfeit their fee or pursue an investigation of their practice.

25. *See, e.g.*, United States v. Harvey, *appeal pending*, No. 86-5025 (4th Cir. Aug. 8, 1986).

A. *Methods of Judging Legitimacy*

There are a number of ways to assess the legitimacy of such prosecutorial practices. One possible measure is to rely on the objective or goal of a particular practice and ask whether that objective is permissible. If the objective of an attempt to forfeit an attorney's fee is to prevent a particular attorney from representing the defendant, the practice is illegitimate and unfair. The prosecutor should not be able to deprive the defendant of representation by the attorney of defendant's choice simply to gain a competitive advantage. A conviction should not be based on the defendant's inability to obtain representation by his attorney of choice. While such an analysis is attractive in its simplicity, it is ultimately unsatisfactory because the prosecutor can always articulate a legitimate objective to justify a particular practice.[26] Consequently, inquiry into a prosecutor's true motive is difficult, if not impossible.[27]

The legitimacy of certain prosecutorial practices can also be evaluated by focusing on the particular right that is affected by a given practice. The practices identified above affect the sixth amendment rights of defendants. Because the right to counsel is central to the proper functioning of the adversary process,[28] prosecutorial practices which interfere with that right potentially undermine the adversarial process, regardless of whether the prosecutor can propose a legitimate objective for the practice.[29] Alternatively, the prosecutor could be required to demonstrate that the government's benefit from the practice outweighs the harm to the defendant's sixth amendment rights.[30]

All of the above methods have significant shortcomings in evaluating whether the practices should generally be accepted as legitimate adversarial tactics. A more direct means of evaluating the

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26. For example, to justify forfeiture attempts, prosecutors assert they are merely preventing defendants from benefiting from proceeds of illegal activity. *See* Landers, *Attorney Fee Forfeiture: Can It Be Justified? Yes*, 1 CRIM. JUST. 8 (1986).

27. Simon, *Racially Prejudiced Government Actions: A Motivation Theory of the Constitutional Bar Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1097 (1978).

28. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

29. Under current doctrinal analysis, however, the scope of the sixth amendment right to counsel is limited by a variety of factors, including that a defendant is generally required to demonstrate prejudice. *See, e.g.*, United States v. Morrison, 449 U.S. 361 (1981).

30. Such a cost-benefit analysis however, is dependent upon the subjective valuations placed upon the costs and benefits, and even what should be counted as relevant costs and benefits may be in disagreement. *See* Nix v. Williams, 467 U.S. 431, 457 (1984) (Stevens, J., dissenting).

validity of prosecutorial practices is needed. This article proposes a method of judging the legitimacy of prosecutorial practices which is independent of the defendant's rights affected by these practices. This method is premised upon developing a prescriptive definition of adversarial fairness which can be used by courts to assess the legitimacy of prosecutorial practices in the context of the adversary conflict. The method focuses upon the allocation of adversarial powers between the defense and prosecution.

B. *The Allocation of Power in the Adversary System*

It is first important to recognize that the adversary model of the criminal process is premised upon a stable and predictable allocation of power[31] between the state and the individual.[32] For the proper functioning of the system, it is essential that any allocation of power must be fixed at the outset of the contest, and must not be subject to the unilateral control of one of the parties. If a party is able to control the allocation of powers so as to maintain a consistently superior advantage over its opponent, the goals of the process,[33] which are assumed to be achieved by the outcome of a fair contest, cannot be attained.[34] When one adversary has the ability to unilaterally control the power allocation or rights of its opponent, the process will not only fail to function properly, but will be robbed of its legitimacy. From this perspective, the adversary system is a set allocation of powers which is fixed at the outset.

1. *Powers of the State*

The allocation of power in the adversary system stems from a variety of sources: the Constitution, legislative enactments, court rules, and tradition or custom. A government's power in the criminal process is vested in the prosecutor and associated law enforcement

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31. The term "power" as used here, refers collectively to the rights, options and protections that a party has available in the context of the adversary process.

32. *See generally* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); Saltzburg, *The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 157 (1980); Griffiths, *Ideology in Criminal Procedure*, 79 YALE L.J. 359 (1970).

33. *See* Arenella, *supra* note 32, at 188.

34. As a number of commentators have discussed, the notion that anything resembling parity of power between the state and the individual exists in the criminal justice system may well be a false ideal, not at all reflective of the reality of the operation of the system. *See* Rudovsky, *The Criminal Justice System and the Role of the Police* in THE POLITICS OF LAW 242-43 (D. Kairys ed. 1982); Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 792 (1970).

personnel. The major component of the prosecution's power is the tradition of its monopoly on criminal law enforcement. Prosecutors have the authority to decide to initiate a criminal investigation against an individual, to define the scope of the investigation, and to select the charges to be alleged. The prosecution also has the power to gather and compel evidence through a variety of processes and procedures.[35] In addition, the charging authority gives the prosecutor control of the range of sanctions a person may face. The Federal Rules of Criminal Procedure and the Federal Rules of Evidence provide the prosecution with additional powers.[36] The prosecutor, by virtue of custom, also has the right to make the first opening statement to the jury, the right to present rebuttal evidence to the defendant's cases and the right to make two summations to the jury. These procedures all work to the advantage of the prosecution in attempting to convict the defendant.

2. *Powers of the Defendant*

These same sources, the Constitution, statutes, and historical custom, allocate powers to defendants. The Bill of Rights[37] provides for protection against self-incrimination, for the rights of compulsory process, for confrontation of the state's witnesses and for the assistance of counsel. Statutes and rules also provide the defendant with certain powers, including a limited right to compel discovery from the prosecution[38] and the right to prevent the prosecution from joining unrelated offenses for trial.[39] Historical tradition and custom provide a defendant with the advantage of the presumption of innocence, the requirement that the prosecution prove guilt beyond a reasonable doubt, and the requirement of a unanimous verdict for conviction.

Of all defendants' powers, the right to the assistance of counsel

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35. For example, under the Constitution, law enforcement personnel may, under certain circumstances, seize evidence and obtain other information from citizens. *See* U.S. CONST. amend. IV. Similarly, prosecutors may use grand jury subpoenas to compel a person to produce tangible evidence and to compel sworn testimony.

36. In federal court, for example, the prosecutor has the right to demand that a defendant disclose his or her intention to rely on an alibi or mental defense. *See* FED. R. CRIM. P. 12.1, 12.2. Similarly, the federal rules of evidence give prosecutors the ability to use evidence of a defendant's uncharged misconduct to help prove that the defendant committed the crime charged. *See* FED. R. EVID. 404(b).

37. U.S. CONST. amend. I-X.

38. *See* FED. R. CRIM. P. 16; *see also* 18 U.S.C. § 3500 (1984); FED. R. CRIM. P. 26.2.

39. *See* FED. R. CRIM. P. 8.

is arguably the most important.[40] While other rights are integral to the proper functioning of the adversary process, only the right to counsel enables the defendant to assert his or her other rights. The defendant's sixth amendment right to the assistance of counsel encompasses a limited right to be represented by the attorney of his or her choice.[41] As one court has stated, "the most important decision a defendant makes in shaping his defense is his selection of an attorney."[42] Although the defendant's right to counsel of his or her choice is not absolute,[43] the prosecution has never before been given a role in selecting, influencing or vetoing the defendant's choice of attorney.

IV. UNILATERAL CONTROL OVER THE ALLOCATION OF POWER

As noted above, the allocation of power must be set at the beginning of the contest. However, the respective powers of the adversaries are not fixed throughout time. For example, when Congress amended the Federal Rules of Criminal Procedure to provide the prosecution with a right to reciprocal discovery from the defendant,[44] Congress gave additional powers to the prosecutor which affected the overall balance of power between adversaries. Similarly, the courts constantly, and sometimes explicitly, shift the allocation of adversarial powers.[45] Indeed, the historical development of the right

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40. "In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel." Lakeside v. Oregon, 435 U.S. 333, 341 (1978); *see also* Powell v. Alabama, 287 U.S. 45 (1932); Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982).

41. *See* Linton v. Perini, 656 F.2d 207 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

42. United States v. Laura, 607 F.2d 52, 55 (3d Cir. 1979).

43. For example, the exercise of the right may not be used to manipulate the scheduling of a trial. Morris v. Slappy, 461 U.S. 1 (1983).

44. *See* FED. R. CRIM. P. 16(b).

45. On some occasions, courts have explicitly referred to the concept of a balance of forces between adversaries in defining the rights of the parties. *See, e.g.*, Wardius v. Oregon, 412 U.S. 470, 474 (1973); *see also* Weatherford v. Bursey, 429 U.S. 545, 554-56 (1977) (Marshall, J., dissenting). That is, courts have defined the rights of the parties (or allocation of power) based on the notion that there must be a rough semblance of parity between adversaries. Recently, for example, the Supreme Court refused to extend the rule of Miranda v. Arizona, 384 U.S. 436 (1966), to apply to a demand by a lawyer, rather than the defendant, to have counsel present during police interrogation, on the ground that the original boundaries of *Miranda* (requiring the defendant to assert the right), struck the proper balance between the interests of law enforcement and the rights of the accused. Moran v. Burbine, 106 S. Ct. 1135 (1986). Justice O'Connor, in writing for the majority, explicitly stated that the fifth amendment right against self-incrimination does not require that the police provide assistance to the defendant in taking the best tactical position possible in the litigation. *Id.* at 1142. In other words, the Court refused to expand *Miranda* and the privilege against self-incrimination to give the defendant a greater tactical advantage than is already provided defendants.

to counsel reflects the Supreme Court's growing recognition that assistance of counsel must be guaranteed if the balance of power is to remain relatively stable.[46]

While the individual components of the balance of powers continually change, such change in the allocation of rights and powers must be beyond the control of the parties themselves. An arrangement in which one of the litigants could control what rights were to be accorded its opponent would undermine the entire concept of a balance of power between adversaries. Any contest between adversaries in which one of the opponents has the ability to unilaterally determine and control the rights that may be exercised by its adversary cannot be considered fair or legitimate. The outcome of the litigation in such a situation would be determined solely by one party's exercise of control over the rights granted to the other party. In short, one of the parties would have the ability to control the results by changing the rules to ensure that it would win.

It is true that the adversaries in every case attempt to exercise their power to defeat the opponent. In so doing, adversaries attempt to influence and exercise control over the rights of their opponent. For example, a prosecutor may bring additional charges in the hope that the defendant will decide to plead guilty rather than proceed to trial. In such an instance, the prosecutor is attempting to exercise control over the defendant's right to trial by employing one of its allocated powers — the power to decide what charges to allege. In *Bordenkircher v. Hayes*,[47] the prosecution brought additional charges against the defendant in response to his assertion of his right to proceed to trial. The additional charges meant that the defendant, if convicted, faced a mandatory life imprisonment term rather than the two to ten year term he faced when the prosecution was initiated. There was no dispute that the prosecutor's purpose in making the additional charges was to force the defendant to forfeit his right to a jury trial and plead guilty. While this tactic was surely coercive and was meant to affect the defendant's exercise of one of his most important rights, the Supreme Court found that the prosecution's adding of charges was an acceptable practice in the overall context of the adversary battle.[48] The prosecution was using one of its allocated

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46. *See* Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 COLUM. L. REV. 9 (1986); Genego, *The Future of Effective Assistance of Counsel*, 22 AM. CRIM. L. REV. 181 (1984).

47. 434 U.S. 357 (1978).

48. *Id.* at 364. It can be persuasively argued that the Court's decision in *Hayes* was wrong and that the practice used there should not be allowed because it legitimizes

powers (the charging function) to accomplish a legitimate objective (to encourage pleas of guilty).

In contrast, when a prosecutor issues a grand jury subpoena to defendant's lawyer and thereby deprives the defendant of that lawyer's services, the prosecutor oversteps the bounds of adversarial fairness. Even though the prosecutor is employing an allocated power (the right to gather all unprivileged evidence of a crime) in an attempt to help ensure a conviction, the prosecutor's actions are unjustified because they effectively deny the defendant a choice of counsel. Unlike the situation in *Hayes*, the defendant cannot decide, despite heavy pressure, to exercise a power allocated to him or her. The prosecutor is able to deprive the defendant of the lawyer of his or her choice. While the prosecutor in *Hayes* may have been using heavy handed tactics in attempting to force the defendant to forego his right to a jury trial, the prosecutor was not able to control the allocation of power; the defendant was still free to reject the prosecutor's demands and proceed to trial.

V. CONCLUSION

The legitimacy of the prosecutorial practices which can result in a defendant being denied the attorney of his or her choice may be analyzed under the principle of unilateral adversarial control over the allocation of powers. Under this principal, prosecutorial practices, such as bringing a motion to disqualify a defense attorney, would be permissible because the prosecutor must seek and obtain judicial approval for the disqualification. Thus, tactics which do not provide the prosecution with unilateral control over the defendant's powers may be seen as not being prohibited by this principle.

In contrast, practices which enable the prosecutor to deprive the defendant of his sixth amendment right to counsel of his or her choice without judicial authorization would be prohibited. Grand jury subpoenas issued to attorneys for client-related information, forfeiture allegations against attorneys' fees, and the threat of seeking forfeiture of fees enable the prosecutor to exercise unilateral control over the allocation of power to the defendant. Because these practices give prosecutors unilateral and absolute control over the allocation of power, the practices are not legitimate adversarial tactics.

The problem of identifying a prescriptive definition of adversarial fairness is difficult and complex. The principle discussed here,

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prosecutorial vindictiveness. *Id.* at 372 (Powell, J., dissenting). Nonetheless, for the purposes of the present discussion, *Hayes* is accepted on its own terms.

prohibiting unilateral adversarial control over the allocation of powers, is proposed as a useful means of defining what is different, and dangerous, about prosecutorial practices which affect defendants' sixth amendment right to counsel. Left unchecked, the government's ability to affect the representation received by a defendant through these practices has serious implications for the proper functioning of the adversary system and for the fairness and legitimacy of the criminal justice system.